(3)

Supreme Court, U.S.
FILED
JUN 7 2001
CLERK

No. 00-1295

IN THE

Supreme Court of the United States

Community Health Partners, Inc., and
Reservoir Park Health Services, Inc.,
doing business as Center Care,
Petitioners,

v.

Commonwealth of Kentucky and
Janie A. Miller, Commissioner of Insurance,
Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

REPLY BRIEF FOR THE PETITIONERS

Murry A. Raines
English, Lucas, Priest & Owsley
1101 College St.
Bowling Green, KY 42101

Daniel M. Mulholland III
Rachel Remaley
Horty, Springer & Mattern, P.C.
4614 Fifth Ave.
Pittsburgh, PA 15213

Thomas C. Goldstein
(Counsel of Record)
Amy Howe
Thomas C. Goldstein, P.C.
4607 Asbury Pl., N.W.
Washington, DC 20016
(202) 237-7543

June 7, 2001

13 pp

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

REPLY BRIEF FOR THE PETITIONERS 1

I. The Court Should Grant Certiorari to Determine Whether AWP Statutes "Regulate Insurance" And Should Hold the Petitions Relating to External Independent Review Boards. 1

II. The Circuit Conflict Over Whether ERISA Preempts State AWP Statutes Merits Review in This Court. 4

III. Certiorari Is Also Warranted Because the Decision Below Conflicts With This Court's Precedents. 7

CONCLUSION 10

TABLE OF AUTHORITIES

Statutes

29 U.S.C. § 1132(a) 2

29 U.S.C. § 1144(a) 2

29 U.S.C. § 1144(b) 7

Ky. Rev. Stat. Ann. § 304.17A-005(22) 5

Cases

Corporate Health Ins. v. *Texas Dep't of Ins.*, 215 F.3d 526 (CA5 2000), *pet. for cert. pending sub nom. Montemayor* v. *Corporate Health Ins.* (No. 00-665) 2

Group Life & Health Insurance Co. v. *Royal Drug Co.*, 440 U.S. 205 (1979) 7, 8, 9, 10

Moran v. *Rush Prudential HMO*, 230 F.3d 959 (CA7 2000), *pet. for cert. pending* (No. 00-1021) 2

New York State Conference of Blue Cross & Blue Shield Plans v. *Travelers Ins. Co.*, 514 U.S. 645 (1995) 7

Pilot Life Ins. Co. v. *Dedeaux*, 481 U.S. 41 (1987) 8

Prudential Insurance Co. of America v. *National Park Medical Center*, 154 F.3d 812 (CA8 1998) 1, 4, 6

Union Labor Life Insurance Co. v. *Pireno*, 458 U.S. 119 (1982) 7, 8, 9, 10

REPLY BRIEF FOR THE PETITIONERS

The petition for certiorari demonstrated that review should be granted to determine whether state "Any Willing Provider" ("AWP") statutes "regulate insurance" and therefore are saved from preemption by ERISA. The question has great national significance for the delivery of health care, as the petition explained at length and respondent does not contest. See Pet. for Cert. 25-30. The question is furthermore the subject of a widely acknowledged and entrenched circuit conflict, implicitly acknowledged by the court below, particularly between the Eighth Circuit's holding that AWP statutes are preempted and the contrary view of the Sixth and Fourth Circuits. See *id.* 18-25. Respondents' passing attempt (BIO 18-19) to distinguish the Arkansas statute at issue in *Prudential Insurance Co. of America* v. *National Park Medical Center*, 154 F.3d 812 (CA8 1998), both misstates the requirements of Arkansas' and Kentucky's AWP laws and misapprehends the Eighth Circuit's rationale in that case. See *infra* at 4-7. Finally, respondents fail to distinguish persuasively this Court's precedents holding that agreements between insurers and third parties do not constitute the business of insurance. See *infra* at 7-10. Before turning to those issues, however, we address the relationship between the question presented by this petition and that presented by two related petitions involving external independent review statutes.

I. The Court Should Grant Certiorari to Determine Whether AWP Statutes "Regulate Insurance" And Should Hold the Petitions Relating to External Independent Review Boards.

Together with No. 00-1471, *Kentucky Ass'n of Health Plans* v. *Miller*, two petitions for certiorari now before the Court present the question whether AWP statutes are preempted by ERISA. Two other pending petitions raise the question whether state "external independent review" ("EIR") statutes are preempted by ERISA. No. 00-665, *Montemayor* v. *Corporate Health Ins.*; No. 00-1021, *Rush Prudential*

HMO v. *Moran*. The Fifth and Seventh Circuits have divided over whether EIR statutes conflict with ERISA's judicial enforcement provision, 29 U.S.C. § 1132(a). The Solicitor General has expressed the view of the United States that certiorari should nonetheless be denied in the EIR petitions, principally because the question they present may be substantially affected by pending federal legislation. Br. of U.S. 13-16.[1]

The AWP and EIR petitions both involve the proper construction of ERISA's insurance savings clause. Although the courts in *Montemayor* and *Rush Prudential* rested their decisions on conflict preemption, a preliminary and potentially dispositive issue in both cases is whether EIR statutes are invalid under ERISA's express preemption provision, 29 U.S.C. § 1144(a), because they do not "regulate insurance." The Fifth and Seventh Circuits considered that issue before reaching the conflict preemption question. See *Corporate Health Ins.* v. *Texas Dep't of Ins.*, 215 F.3d 526, 537-39 (CA5 2000), *pet. for cert. pending sub nom. Montemayor* v. *Corporate Health Ins.* (No. 00-665); *Moran* v. *Rush Prudential HMO*, 230 F.3d 959, 969-70 (CA7 2000), *pet. for cert. pending* (No. 00-1021); see also Br. of U.S. 3 (*Montemayor*), 7 (*Rush Prudential*). The plaintiff health plans in both cases have preserved the express preemption issue and plainly intend to raise it in this Court.

Given the close relationship between the AWP and EIR petitions, this Court's ordinary practice would be to hold one pending the disposition of the other. For three reasons, the proper course is to grant certiorari in the AWP petitions while holding the EIR petitions for later consideration.

---

[1] Because we discuss the proper disposition of the *Montemayor* and *Moran* petitions, we are serving this reply brief on counsel in those cases as well as on the Solicitor General of the United States.

First, this Court's resources would be better spent addressing the insurance savings clause question in the context of the AWP petitions, in which it is most directly presented. As the United States explains (Br. at 17 n.4), that question is of substantial national importance; it furthermore would affect the analysis of the preemption question presented by the EIR petitions.[2] If the Court were instead to grant certiorari only in the EIR cases, by contrast, it might ultimately decide them by only addressing the conflict preemption issue on which the Fifth and Seventh Circuits divided. Such a decision would not provide any guidance regarding whether ERISA preempts state AWP statutes, and the Court would likely then find it necessary to grant certiorari in the AWP petitions as well.

Second, the AWP petitions present a more developed, and therefore more appropriate, vehicle for considering the scope of the insurance savings clause. While the question whether ERISA preempts AWP statutes has been considered in fourteen cases from nine different states (see Pet. for Cert. 26 & n.12), the parallel inquiry into EIR statutes has been undertaken in only the two cases now pending (see Br. of U.S. 16). Furthermore, the circuits and district courts have divided over the proper savings clause analysis, such that the competing views have been better ventilated.

Third, the Court would be better served to hold the EIR petitions than to deny them. The Solicitor General's view that pending federal legislation may affect the analysis of state EIR statutes rests on two contingencies: (i) that federal EIR legislation will in fact be adopted; and (ii) that the particular legislation adopted will affect the preemption analysis of parallel state legislation. The Solicitor General furthermore apparently believes that review would be appropriate if

---

[2] Indeed, as our petition noted (at 24), the Fifth Circuit's analysis of the insurance savings clause issue in *Montemayor* rested principally on precedents addressing AWP statutes.

such legislation is not adopted "in the near future." Br. of U.S. 17. By holding the EIR petitions, the Court would preserve the opportunity to consider those cases if appropriate next Term. By contrast, if the Court denies the EIR petitions and the contingencies raised by the Solicitor General do not arise, ERISA plans and policyholders in those states with EIR statutes will be forced to endure unnecessary uncertainty and costly litigation until another appropriate vehicle to address the question is presented to this Court.

II. The Circuit Conflict Over Whether ERISA Preempts State AWP Statutes Merits Review in This Court.

The principal basis for granting certiorari in this case is the conflict between the Sixth Circuit's decision and the Eighth Circuit's contrary holding in *Prudential Insurance Co. of America* v. *National Park Medical Center*, 154 F.3d 812 (CA8 1998). See Pet. for Cert. 19-23.[3] Respondents contend that the Eighth Circuit's decision is distinguishable because that court "determined that [the Arkansas AWP statute] did not meet the 'common sense test' as a statute that regulated insurance" because it "included 'employers and administrators of self-insured plans.'" BIO 18. Respondents misapprehend the scope of Arkansas' and Kentucky's AWP statutes, as well as the Eighth Circuit's rationale.

The Eighth Circuit would not find any relevant distinction between the Kentucky and Arkansas AWP provisions under the "common sense" test. The Eighth Circuit held that a statute satisfies that test only if it is "specifically directed toward" the insurance industry, which that court held encompasses only "traditional insurance." 154 F.3d at 827-29. The court

---

[3] The petition (at 23-25) also correctly alleged a conflict with decisions of the Fifth Circuit invalidating the AWP statutes of Texas and Louisiana. Respondent's attempt to distinguish the Fifth Circuit's decisions is addressed by the Reply Brief of the petitioners in the *Kentucky Association of Health Plans* case (at 3-5).

held that the Arkansas AWP statute failed the common sense test because it applied to "broadly defined health benefit plans, only some of which" fell within its conception of "the insurance industry." *Id.* at 829. Precisely the same is true of the Kentucky statute, which expressly applies to essentially every form of health benefit plan and medical institution. The statute thus encompasses, for example, any HMO, "provider-sponsored integrated health delivery network," or "non-profit hospital." Ky. Rev. Stat. Ann. § 304.17A-005(22), *quoted in* Pet. App. 35a. The Eighth Circuit also rejected the argument (see 154 F.3d at 829), on which the Sixth Circuit (Pet. App. 23a) and respondents (BIO 7) place considerable weight, that a statute regulates the insurance industry when it is enacted as part of the state's insurance code.

The Eighth Circuit did not focus on whether the Arkansas statute applies to "employers and administrators of self-insured plans" (contra BIO 18), but in any event respondents are wrong to attempt to distinguish the Kentucky AWP statute on that basis. As the Sixth Circuit squarely held, the Kentucky provision applies to all self-insured plans other than ERISA plans and to all plan administrators other than administrators of ERISA plans. See Pet. for Cert. 23 n.11 (citing Pet. App. 56a-57a & 59a n.15). The statute thus expressly applies to any "self-insurer or multiple employer welfare arrangement not exempt from state regulation by ERISA." Ky. Rev. Stat. Ann. § 304.17A-005(22), *quoted in* Pet. App. 35a. The majority below accordingly held that "under the current AWP statute, * * * a self-insurer of a non-ERISA benefit plan[] must not discriminate against qualified providers." Pet. App. 58a n.14. It furthermore held that "a plan administrator [of a self-insured plan] would necessarily be required to comply with the plan's non-discriminatory requirement." *Id.* The Eighth Circuit thus would hold that, even as to self-insured employers and plan administrators, the Kentucky AWP statute is not limited to the insurance industry.

Respondents' attempt to distinguish *National Park Medical Center* is also flawed because it rests on the serious misstatement (BIO 18) that the Eighth Circuit's decision turned only on the court's holding that Arkansas' AWP statute "did not meet the 'common sense test' as a statute that regulated insurance." In reality, the Eighth Circuit held that AWP statues fail *all three* of the McCarran-Ferguson criteria and rejected each of the critical legal conclusions on which the decision below rests. See generally Pet. for Cert. 19-23. Because there is no plausible argument that the Eighth Circuit would not invalidate the Kentucky AWP statute on these bases, respondents do not even attempt to offer one. In particular, the Eighth Circuit squarely held that AWP statutes "plainly do[] not have the effect of transferring or spreading the policyholder's risk." 154 F.3d at 829.[4] The Eighth Circuit furthermore holds that, although AWP statutes "might be an integral part of the relationship between insurer and a third party to the insured-insurer relationship, the health care provider," they manifestly are not "an integral part of the policy relationship." *Id.*

Finally, respondents' argument assumes that this Court will grant certiorari to resolve conflicting decisions in the circuits only if the state laws in question are in all respects indistinguishable. That premise, however, fails to recognize that state legislatures rarely parrot one another exactly, a fact that has never been seen as an obstacle to this Court's intervention to resolve uncertainty regarding the proper application of statutes, such as ERISA, that profoundly affect millions of Americans. In point of fact, the purpose of ERISA's preemption clause is to preclude inconsistent and varying state regulation. *New York State Conference of Blue Cross & Blue*

---

[4] As the petition notes (Pet. for Cert. 21 n.10), the proper analysis of the "risk spreading" prong of the McCarran-Ferguson criteria is itself the subject of a circuit conflict directly implicated by this case.

Shield Plans v. *Travelers Ins. Co.*, 514 U.S. 645, 656-57 (1995). The widely acknowledged inconsistent application of ERISA's preemption provision to AWP statutes clearly merits review in this Court.

III. Certiorari Is Also Warranted Because the Decision Below Conflicts With This Court's Precedents.

Respondents argue that the Sixth Circuit's determination that Kentucky's AWP statute "regulates insurance" is entirely consistent with this Court's precedent. However, respondents cannot credibly distinguish the provider agreements at issue in *Group Life & Health Insurance Co.* v. *Royal Drug Co.*, 440 U.S. 205 (1979), and *Union Labor Life Insurance Co.* v. *Pireno*, 458 U.S. 119 (1982), from the insurer-provider agreements regulated by Kentucky's AWP statute. Instead, respondents rely on a fundamental mischaracterization of the AWP statute, seeking to convince this Court that because the statute was intended to ensure "access to health care," it therefore "regulates insurance" within the meaning of 29 U.S.C. § 1144(b). As petitioner Kentucky Association of Health Plans explains (Reply Br. 8), "access to health care" is irrelevant in determining whether the Kentucky AWP statute regulates insurance. Despite respondents' sweeping rhetoric, the AWP statute at issue in this case is nothing more than a statute directed at the contracts between insurers and third-party providers. This Court has never held that such contracts are "the business of insurance"; to the contrary, the decision below is squarely in conflict with this Court's precedents.

Respondents first argue that Kentucky's AWP statute regulates insurance "as a matter of common sense." As the petition explains, however (at 11-12), this Court has sustained under that test only statutes that directly regulate either the insurer-insured relationship or the insurer itself. Respondents do not seriously dispute this, arguing instead (BIO 9) that the Kentucky AWP statute regulates insurance "as a matter of common sense" because it is "specifically directed at the insurance industry." BIO 9 (*Pilot Life Ins. Co.* v. *Dedeaux*, 481

U.S. 41 (1987)). This is simply not true, as Kentucky's AWP statute regulates two separate groups of entities *outside* the insurance industry: providers and self-insurers.

Respondents' further efforts to characterize Kentucky's AWP statute as one that regulates insurance as a matter of common sense – by describing, *e.g.*, the statute's location within Kentucky's insurance code, its application only to entities regulated by the Kentucky Department of Insurance, the legislature's purported desire to increase benefits to insureds, and the assertion that the AWP statute "regulates the basic core of the insurance contract in an innovative manner" – are also unavailing. The AWP statute does not regulate the business of insurance simply because respondent says that it does. Rather, the statute regulates contracts between insurers and third-party providers and, as such, does not regulate the business of insurance as a matter of "common sense."

Respondents next attempt to demonstrate that the Kentucky AWP statute satisfies each of the three McCarran-Ferguson criteria.[5] Once again, however, respondent's arguments and mischaracterizations of the AWP statute cannot obscure the square conflict between the Sixth Circuit's decision and this Court's precedent. For example, respondents argue (BIO 11) that the first McCarran-Ferguson criterion –

---

[5] Respondent's suggestion that *Royal Drug* and *Pireno* cannot be "transferred to the ERISA preemption context" because they were antitrust cases is unavailing. See Pet. for Cert. 17-18 & n.9. To the extent that there is any distinction between the application of the three McCarran-Ferguson criteria to antitrust cases such as *Royal Drug* and *Pireno*, on the one hand, and ERISA preemption cases on the other hand, such a distinction would actually weigh in *petitioner's* favor. ERISA's savings clause refers only to statutes that "regulate[] insurance" and therefore should be interpreted even more narrowly than the antitrust provision of the McCarran-Ferguson Act at issue in *Royal Drug* and *Pireno*, which refers to laws regulating the "business of insurance."

whether the statute transfers or spreads the policyholder's risk – is satisfied because the statute "benefits the consumer by shifting part of the cost of healthcare from the insured to the insurer" and thereby "lessening the chances that the consumer will have to pay out-of-pocket to visit a provider of choice." However, this Court has clearly indicated that the "risk" spread or underwritten by an insurance contract is the risk that the insured will become ill and be unable to pay for treatment, see, *e.g.*, *Royal Drug*, 440 U.S. at 211, while agreements between insurers and third-party providers (such as the agreements at issue in this case) "serve only to minimize the costs [the insurer] incurs in fulfilling its underwriting obligations," *id* at 213. Just as respondents cannot demonstrate that AWP statutes regulate insurance as a matter of common sense simply by making a statement to that effect, so too respondents cannot argue that the first McCarran-Ferguson criterion is satisfied simply by defining "risk" in a way that is convenient for them but directly contrary to this Court's precedent.[6]

This Court's precedents are (as petitioners have previously noted, see Pet. for Cert. 14-16) similarly dispositive of respondents' arguments regarding the second and third McCarran-Ferguson criteria. Respondents appear to argue that the second criterion – whether the practice is an integral part of the policy relationship between the insurer and the insured – is satisfied insofar as "[a]ccess to quality healthcare providers through insurers is of vital concern to consumers" and forms "the core of every health insurance contract." BIO 12-13. Even if respondents are correct to suggest that insureds are

---

[6] Notably, respondents make no real attempt to reconcile their view of what constitutes "risk-spreading" with this Court's holdings in *Royal Drug* and *Pireno*, relying instead on decisions by other courts of appeals. See BIO at 11-12. Moreover, support for the Sixth Circuit's holding on the first McCarran-Ferguson criterion is far from uniform, as the courts of appeals are in fact divided over this issue. Pet. for Cert. 21-22 & n.10.

concerned with their access to healthcare providers, this concern has absolutely no bearing on whether agreements between insurers and third-party providers are an integral part of the *relationship* between insurers and insureds. As this Court held in both *Royal Drug* and *Pireno*, insurer-provider agreements are merely "separate contractual arrangements" and are in no way part of the insurer-insured relationship. Finally, the AWP statute on its face fails to meet the third McCarran-Ferguson criterion – whether it is limited to entities within the insurance industry – because (as noted above) it applies to providers and self-insurers as well as insurers.

Because Kentucky's AWP statute does not regulate insurance as a matter of "common sense" and, furthermore, fails to satisfy any of the three McCarran-Ferguson criteria, the Sixth Circuit's decision that the statute is saved from ERISA preemption conflicts with this Court's precedents.

CONCLUSION

For the foregoing reasons as well as those set forth in the petition, certiorari should be granted.

Respectfully submitted,

Murry A. Raines
English, Lucas, Priest & Owsley
1101 College St.
Bowling Green, KY 42101

Daniel M. Mulholland III
Rachel Remaley
Horty, Springer & Mattern, P.C.
4614 Fifth Ave.
Pittsburgh, PA 15213

Thomas C. Goldstein
(Counsel of Record)
Amy Howe
Thomas C. Goldstein, P.C.
4607 Asbury Pl., N.W.
Washington, DC 20016
(202) 237-7543

June 7, 2001